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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1949.

COMMONWEALTH EX. REL. DAVID DARCY,

v.

EARL D. HANDY, WARDEN, BUCKS COUNTY PRISON.

BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Respondent respectfully presents:

Petitioner asserts that the introduction into evidence of other crimes which occurred both before and after the commission of the alleged robbery-killing of Kelly violated the Fourteenth Amendment of the United States Constitution in that it deprived him of a fair trial by due process of law.

The Commonwealth contends that the introduction of such evidence raises no Federal Constitutional issue and that your Honorable Court should not take cognizance of this Petition by issuing a Writ of Certiorari thereon.

Petitioner cites no case wherein it has been decided by your Honorable Court that the introduction into evidence of unassociated crimes violates the "due process clause" of the United States Constitution or that the admission of such evidence makes it impossible for a "fair trial" to be conducted.

Petitioner admits that under the decided cases of Pennsylvania, such evidence is admissible and proper. The Commonwealth takes the position that the introduction of the commission of other crimes into evidence is a matter solely of State Law. To say that a fair trial is impossible, thereby

violating the "due process" clause, because it is shown that the accused has committed a series of crimes of the same kind over a period of less than one month is unsound.

It must be borne in mind that there was overwhelming evidence that the Petitioner participated in the robbery-slaying of Kelly. Petitioner did not deny the facts of his participation in either the killing or the series of other crimes that were introduced into evidence. The evidence of these other crimes which were committed prior to the killing of Kelly was introduced by means of a signed statement made by the Petitioner himself. No question has been raised at any stage of the proceedings indicating that this statement of the Petitioner was obtained improperly or that any of the Petitioner's Constitutional rights were not adequately and completely protected in obtaining this statement. How then can it be said that placing this statement into evidence made a fair trial impossible and that the trial was held without due process of law?

Petitioner suggests that evidence of unassociated offenses is "objectionable not because it has no appreciable probative value but because it has too much." Apparently, therefore, Petitioner claims that his Constitutional rights to a fair trial were violated because there was admitted evidence of too great probative value against him. This seems to us to be a unique and absurd conception of the Fourteenth Amendment of the United States Constitution.

As pointed out in the decision of the Supreme Court of Pennsylvania in this case, the proof of the other crimes was independently relevant to the issue raised of the guilt of the crime charged in the indictment. Therefore, the Court by limiting the purposes for which the jury might consider these other crimes to the question of penalty gave Petitioner a far greater benefit than he was by right entitled to.

Petitioner relies on the case of *Michelson v. United States*, — U. S. —, 93 Law. Ed. 160, in support of his contention. The facts of that case, the issues involved on ap-

peal, and the decision reached by the Court, vary so greatly from the present case that it is scarcely in point at all except for mere dictum. The question there raised did not involve an interpretation of the Fourteenth Amendment. The question was as to the relevancy of certain cross-examination of Defendant's character witnesses.

Finally, the only possible consideration which the jury could have given to the testimony of other crimes would have been in determining which penalty to impose. The evidence of Petitioner's participation in the actual crime charged was so conclusive that no reasonable juror could have any doubt.

The Commonwealth called sixteen witnesses who were present in the Feasterville Tavern when the robbery occurred. Every one of these witnesses definitely and positively identified Petitioner and testified that he was present and that he was one of the robbers. The killing of Kelly outside the Tavern while the robbers were escaping was conclusively shown. This evidence as to other offenses was to aid the jury in fixing the penalty. It was on this theory that the evidence was introduced and it was on this theory that it was submitted to the jury, even though, under the law of Pennsylvania, it could have been used for a broader purpose (*Com. v. Williams,* 307 Pa. 134).

In conclusion, therefore, the Commonwealth contends that the introduction into evidence of a series of other robberies engaged in by the Petitioner both before and after the killing of Kelly—covering a period of approximately one month—violated none of the Petitioner's Constitutional rights. First, the evidence had independent relevancy on the question of guilt or innocence of the Petitioner. Secondly, the jury was limited in considering this testimony solely to the question of penalty, both by the charge of the Court and from the factual situation of the case. Thirdly, the evidence of the crimes prior to the killing of Kelly was obtained from the free, voluntarily signed statement of the Petitioner. Finally, Petitioner was given a fair

trial that meets with all the tests required under the Fourteenth Amendment of the United States Constitution.

Wherefore, the said Respondent respectfully requests that the aforesaid Petition be dismissed.

Respectfully submitted,

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